Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

ROSE ACRE FARMS, INC.,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should resolve the prevailing confusion as to what constitutes the proper denominator in the takings fraction.

2. Whether this Court should resolve the longstanding confusion over the legal standards that govern a regulatory takings challenge under the Fifth Amendment.

3. Whether the confiscation and destruction of private property—in this case, thousands of healthy, egg-producing hens—constitutes a categorical taking under the Fifth Amendment.

CORPORATE DISCLOSURE STATEMENT

Rose Acre Farms, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case presents recurring and important issues in takings jurisprudence. Both state and federal courts are in substantial disarray with respect to the legal standards governing regulatory takings challenges under this Court's watershed decision a generation ago in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In addition, no consistent or coherent legal boundary marks the vital distinction between a regulatory taking (which is measured under *Penn Central*) and a categorical taking (which is not). The upshot is an appalling state of unpredictability for both government authorities and for property owners confronting Fifth Amendment takings issues. This case presents an attractive vehicle for addressing this vital area of constitutional law.

Here, the federal government, through the United States Department of Agriculture ("USDA"), prohibited a family-owned farm, Rose Acre, from selling nearly 700 million healthy eggs as table eggs for an extended two-year period. The result of this exercise in federal power was a forced sale below the cost of production and, in consequence, a vast economic loss. The means chosen by the USDA, moreover, were largely experimental, based not on sound science, but on an assumption that the ubiquitous presence of salmonella bacteria in an egg-producing hen or hen environment would translate into salmonella-contaminated eggs. The agency was profoundly wrong. The record in this case proved (1) that the USDA's assumption with respect to a connection between hens and contaminated eggs was seriously flawed and (2) that no Rose Acre egg was ever shown to contain salmonella. To make matters worse, the USDA ordered the seizure and destruction of more than 6,000 healthy hens which had been producing healthy eggs.

The United States Court of Federal Claims found both USDA actions (restriction of healthy eggs and destruction of healthy hens) to constitute a taking under the Fifth Amendment and awarded Rose Acre more than $6 million in compensation and more than $2 million in fees and costs. The Federal Circuit reversed, reviewing both actions (including the outright destruction of hens) as a regulatory taking and thus subject to the *Penn Central* balancing test. In the process, the Federal Circuit reconfirmed the existence of deep confusion in the lower courts and reinforced existing conflicts on legal issues that warrant this Court's review.

At bottom, no party should again be subject to what has happened to Rose Acre in this case—including more than a dozen years of litigation, governed by shifting legal standards and inconsistent application of the U.S. Constitution, with no compensation or expenses awarded for the government confiscation of healthy and economically productive private property.

OPINIONS BELOW

The Federal Circuit's decision is reported at 373 F.3d 1177 and reprinted in the Appendix ("App.") at 1a-35a. The United States Court of Federal Claims decision is reported at 55 Fed. Cl. 643 and reprinted in the Appendix at 36a-88a.

JURISDICTION

The Federal Circuit rendered its decision on June 30, 2004, App. 1a, and denied a timely petition for rehearing on October 22, 2004, App. 1a. The Chief Justice extended the time to file this petition to and including February 24, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS

The Fifth Amendment provides in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

At issue in this case is who must pay when the government destroys and/or severely restricts healthy and economically productive private property in an effort to protect the public health. In this case, the federal government imposed severe restrictions on three of Rose Acre's farms that led to the destruction of more than 6,000 healthy hens and the diversion of nearly 700 million healthy eggs into a segment of the egg market where Rose Acre was unable to recoup its investment in the eggs. The question presented by these restrictions is not whether the government can take action to safeguard the public's health—that power is undisputed—but whether a private farming business must *alone* bear the cost of that action.

A. General Background on the Egg Farming Market

Egg farming is a highly competitive business with razor-thin profit margins. The business consists of two principal markets: the table egg market and the breaker egg market. The table egg market—through which whole eggs are sold directly to commercial end users—is the more desirable and profitable market for most egg producers. The breaker egg market—through which eggs are sold in liquid form, often for use in secondary products such as cake mixes—is considerably less profitable and remains principally the destination for the inferior-quality eggs not suitable for the table egg market. There is no dispute here that table eggs command a considerably higher price than breaker eggs. App. 37a & n.1, 49a. Nor is there any dispute that at all times relevant to this case, an egg sold in the breaker market sold for less than Rose Acre's average cost of producing the egg. App. 49a.

Rose Acre Farms is a family-owned business in Indiana that specializes in the production of table eggs. App. 2a. It began with a single farm in 1955 and over time became one of the largest egg producers in the United States. By 1990,

Rose Acre operated eight farms in Indiana and Iowa with millions of hens producing billions of eggs per year. App. 2a. Three Rose Acre farms are at issue here: Cort Acres, White Acres, and Jen Acres. Each farm contains dozens of hen houses and hundreds of thousands of healthy hens that produce marketable table eggs. *Id.*

As of 1990, Rose Acre sold more than 97% of these eggs in the profitable table egg market, sending only eggs of inferior quality to the breaker egg market. App. 10a-11a, 48a. At issue in this case are USDA regulations that, among other things, forced Rose Acre to divert nearly 700 million healthy eggs to the breaker market at prices below the cost of production. App. 10a-11a, 49a. Rose Acre, consequently, was unable to recoup its investment for any of these diverted eggs. Indeed, during the restricted period, the price for a dozen eggs in the breaker market was between 8 and 13 cents *less* than the cost of producing a dozen eggs. App. 49a. The price in the table egg market, by contrast, was approximately 4 cents *above* such production costs. *Id.*[1]

The USDA restrictions lasted for an extended period of two years, resulting in a total economic impact to Rose Acre of more than $20 million. App. 71a.

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[1] The USDA allowed sale in the breaker egg market because breaker plants separate an egg's liquid contents and then heat the contents to kill any bacteria in the eggs. Consequently, during the restricted period, despite no eggs being found to contain salmonella, Rose Acre was forced to sell all of its restricted eggs to breaker plants. App. 48a-49a n.13. With respect to prices, the average cost for Rose Acre to produce a dozen eggs during the restricted periods was 54.96 cents. Rose Acre received, however, only between 41.46 and 46.67 cents per dozen eggs sold to the breaker market. The average price for table eggs during this period was 59 cents per dozen. App. 49a. These prices—measured to the one-hundredth of a single penny—exemplify the razor-thin profit margins in the egg market.

B. The USDA Regulations and Their Application Against Rose Acre

The USDA regulations were promulgated in an effort to protect the public from *salmonella enteriditis* (SE)—a strain of bacteria that is ubiquitous and impossible to eradicate. App. 40a & n.5, 56a. Individuals can be exposed to SE in numerous ways, but the most common exposure is through the consumption of raw or undercooked animal foods, such as meat, poultry, milk or eggs. App. 40a & n.5, 57a-58a. It is not disputed that eggs are a low-risk source of SE. App. 56a-57a (noting that 99.9725% of eggs tested in one study were SE-free). Nor is it disputed that the proper handling of eggs—thorough cooking, for example—eliminates even this small risk of SE contamination. App. 57a-58.[2]

Nonetheless, in response to an increase in illnesses resulting from SE exposure, the USDA published interim regulations designed to restrict the interstate sale of contaminated eggs and to limit the interstate transportation of contaminated poultry. *See* 9 C.F.R. §§ 82.30-82.36 (1991). Final regulations were published on January 30, 1991. *See id.* The final regulations imposed restrictions only upon individual hen houses (rather than *all* poultry from an individual farm) but otherwise did not materially differ from the interim regime. App. 5a, 43a-45a.

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[2] The relatively low incidence of SE in shell eggs was confirmed by scientific information that USDA obtained both during and after it applied the SE regulations to Rose Acre, beginning in October 1990. For example, USDA's SE Risk Assessment—a comprehensive analysis of the public health effects of consuming SE-infected shell eggs and egg products—predicts that only one in 20,000 eggs will be SE-positive. By comparison, one in ten chicken breasts purchased at the supermarket today contains salmonella. And in 1995, one in five store-bought chicken breasts contained salmonella. *See* Br. of Appellee at 8 (citing C.A. App. 282, 527, 540, 911).

Acting pursuant to these regulations in late 1990 and early 1991, the USDA designated flocks at three Rose Acre farms to be "study flocks" after eggs produced at these farms were believed to be "the probable source" of an SE outbreak. *Id.* § 82.32(a); App. 6a. Under the study-flock designation, the USDA conducted environmental tests (of manure and egg-transport machinery in the hen houses) at the three Rose Acre farms. Because the "study flock" designation did not trigger restrictions on the sale of eggs, Rose Acre continued to sell eggs in the table egg market while USDA conducted environmental tests and awaited lab results. Several weeks later, after one or more hens from the study flock tested SE-positive, the USDA designated these flocks as "test flocks," which imposed severe restrictions on egg sales. App. 4a.; 9 C.F.R. § 82.32(b). These restrictions prohibited Rose Acre from selling in the table egg market any eggs produced in any hen house with a positive SE test. App. 4a-5a.

Further USDA testing revealed that at least one hen in the designated "test flocks" was SE-positive, which resulted in the entire flock being designated as "infected" and then quarantined. To accomplish this testing, the USDA entered Rose Acre's hen houses, physically removed 6,741 hens, slaughtered them, and transported the carcasses to a laboratory for testing by an autopsy procedure. App. at 47a. Out of the millions of hens in the restricted houses, only 147 hens tested positive for SE. *See id.* The result was that for more than two years, the USDA prohibited Rose Acre from selling *healthy eggs* as table eggs with no ability to recoup its initial investment in those eggs. *See id.* At no time, however, was a single egg tested by the USDA, let alone found to contain SE.

C. The Court of Federal Claims Proceedings

Rose Acre filed this takings action in the United States Court of Federal Claims in 1992. App. 36a-88a (Futey, J.). Rose Acre contended that the USDA effectuated a taking under the Fifth Amendment when it restricted the sale of

healthy eggs to the breaker egg market, forcing Rose Acre to sell hundreds of millions of its healthy eggs below the cost of production. App. 58a-59a. Rose Acre also argued that the USDA effectuated a categorical taking when it seized and destroyed thousands of hens. App. 69a-70a. Rose Acre finally contended that actions taken pursuant to the USDA regulations (such as restricting the sale of *eggs* based on the testing of *hens*) were scientifically unsupported and insufficiently related to the public interest. App. 65a-68a. Extensive discovery followed and a bench trial was held on the merits in April and May 2002. App. 52a. After reviewing the evidence presented and applying this Court's takings clause jurisprudence, Judge Futey awarded Rose Acre $6.165 million in compensation. App. 71a-78a. Judge Futey in addition awarded fees and costs of $2.414 million. App. 78a-88a.

Specifically, the trial court found that the USDA's prohibition on the sale of healthy eggs in economically viable markets effected a regulatory taking and that the confiscation and destruction of hens constituted a categorical taking—both requiring just compensation under the Fifth Amendment. In the process, Judge Futey determined that the financial impact of these actions was severe, as demonstrated by the trial record, and the testimony of USDA witnesses, who acknowledged that diversion of healthy eggs to the breaker market "could mean financial ruin for table egg producers." App. 61a.

Judge Futey further found that the SE regulations were "misguided, at best," because they restricted the sale of *healthy eggs* based upon some SE being found in hens and hen houses. App. 56a; *see also id.* at 57a-58a ("[T]he regulations restricted millions of [Rose Acre's] *healthy eggs* by prohibiting their sale in the table egg market") (emphasis in original). Indeed, because SE exists "everywhere," evidence of SE in Rose Acre hens or hen houses "does not indicate that [its] eggs were infected too." *Id.* at 56a. And

trial testimony "proved" that "SE can exist in a hen and still not contaminate the eggs it produces." *Id.* at 70a.

The trial court summed up its holding with respect to the egg restrictions as follows: "It is true that the public has a strong interest in eating safe food, however, the regulations at issue went too far in protecting this interest by prohibiting the sale of [Rose Acre's] *healthy eggs as table eggs*." App. 66a (emphasis added).

The trial court, finally, found that the confiscation and destruction of 6,741 hens effectuated a categorical taking under the Fifth Amendment. There was no evidence that the hens produced eggs with SE and no dispute that the hens were slaughtered solely for testing and analysis. App. 68a-70a. Rose Acre was accordingly entitled to just compensation for the confiscation and slaughter of its hens.

D. The Federal Circuit Proceedings

The Federal Circuit reversed. The court began by disagreeing with the trial court's regulatory takings analysis under *Penn Central*. According to the court, when assessing the economic impact of the USDA regulations, the relevant "denominator" in the takings fraction should have been Rose Acre's three farms *combined*—notwithstanding that the regulations themselves applied only to individual hen houses and restricted the sale of individual eggs. App. 18a-22a. This choice of denominator alone significantly deflated the relevant economic impact of the USDA's confiscations and restrictions. App. 21a. Then, applying *Penn Central*'s character prong, the court required Rose Acre to prove that USDA adopted regulations *known at the time* to be inconsistent with prevailing scientific knowledge about the incidence and detection of SE. App. 29a ("Nowhere does Rose Acre argue (or did it show) that the regulatory means were inconsistent with knowledge the government possessed at the time they were adopted or applied against Rose Acre"). The court additionally subjected Rose Acre's claim

to a "no nexus" requirement under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), holding that the trial court erred because Rose Acre could not prove that the USDA actions lacked a nexus to the public purpose underlying the regulatory scheme. App. 27a-29a.

The court, finally, rejected the trial court's holding that confiscation and destruction of hens by the USDA amounted to a categorical taking. The court concluded instead that the confiscation did not affect *all* of Rose Acre's property—although the court did not say what *all* of Rose Acre's property would be—and thus did not effectuate a categorical taking under the Fifth Amendment. App. 34a. The court finally held that the same *Penn Central* analysis that governed whether restrictions on the sale of Rose Acre eggs was a taking, applied equally to whether the confiscation and slaughter of hens constituted a taking. *See id.* at 34a-35a.

The Federal Circuit remanded to the trial court for a re-evaluation of the *Penn Central* factors pursuant to its new legal interpretations. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD CLARIFY THE *PENN CENTRAL* ANALYSIS WHICH IS THE SOURCE OF CONFUSION AND CONFLICT IN THE AMERICAN JUDICIARY

This case squarely presents legal issues on recurring and important constitutional questions. The first issue pertains to the prevailing confusion as to what constitutes the proper denominator in the takings fraction, a question that determines how courts measure the economic impact of challenged government conduct. As this case demonstrates, the choice of denominator has a significant impact with respect to whether government conduct amounts to a taking under the Fifth Amendment. This question alone warrants this Court's review.

A. This Court Should Clarify How Courts Measure The Denominator Of The *Penn Central* Fraction

This case once again presents "the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). In *Palazzalo*, this Court acknowledged that since defining the denominator as the "parcel as a whole" in *Penn Central*, this Court and lower courts have struggled to understand where the "parcel" begins and ends. *Id.* Previously, the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), admitted that "this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court." *Id.* at 1016 n.7. In both cases, however, the Court declined to address the question because it was either unnecessary, *id.*, or had not been argued below, *see Palazzolo*, 533 U.S. at 631.

This case presents the Court with an attractive vehicle for addressing this "denominator" issue. Indeed, the issue is squarely presented and extensively analyzed in two published opinions below. And it is precisely this question on which lower courts have reached inconsistent results; namely, what constitutes the "parcel as a whole" when the government destroys the economic value of private property as part of a scheme designed to regulate the public health.[3]

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[3] This Court has addressed takings issues most frequently in the context of real property, but the personal property interests at issue here are equally protected by the Fifth Amendment. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156 (1998); *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984). And the question of how to define the "parcel as a whole" does not significantly vary depending on whether the question turns on the land, the produce of the land, or intangible property with no reference to any physical space. *E.g., Ruckelhaus*, 467 U.S. at 1005 (applying *Penn Central* test to intellectual property); *Brown v. Legal Found. of Washington*, 538 U.S. 216 (2003) (applying the *per se* rule for physical invasions of land to the taking of money).

B. Lower Courts Are Divided on How to Measure the Takings Fraction Denominator

Precisely because of the lack of guidance from this Court, lower courts have reached varying, and conflicting, answers to this fundamental Fifth Amendment question. *See* Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. Haw. L. Rev. 353 (2003) (discussing "the many definitions of the 'relevant parcel'—an essential building block in most takings analysis"); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1545-46 (1994) ("Instead of employing a consistent methodology, however, the courts have used a variety of fact-specific and often inconsistent methods to define the relevant parcel."). By and large, courts have applied three approaches to determine the denominator, often with outcome-determinative influence. *See* Fee, *supra*, 61 U. Chi. L. Rev. at 1546-47. These three competing schools can be summarized as follows:

1. *Unity of Ownership School.* Some courts have defined the "whole" by looking to unity of ownership, measuring the "parcel as a whole" based on all contiguous property or all nearby property owned by the plaintiff. *See, e.g., K & K Const., Inc. v. Dep't of Natural Res.*, 575 N.W.2d 531, 537 (Mich. 1998); *Deltona Corp. v. United States*, 657 F.2d 1184 (Ct. Cl. 1981); *Penn Cent. Transp. Co. v. New York City*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd on other grounds*, 438 U.S. 104 (1978). Under this approach, the Fifth Amendment question turns not on the challenged government conduct, but rather on the size of the plaintiff's property or the amount of assets the plaintiff happens to own.[4]

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[4] Although this Court has never expressly repudiated this takings theory, *Lucas* criticized the New York Court of Appeals' application of this

2. *Reasonable Expectation School.* Other courts have measured the denominator by considering the owner's reasonable expectations as shaped by property rights under state law. In applying this standard, courts have looked to multiple factors, including the degree of contiguity, the dates of acquisition, the extent to which the owner has treated the parcel as a single unit, the extent to which the restricted lot benefits the unrestricted lot, the timing of transfers, the owner's reasonable investment-backed expectations, and the owner's plans for development. *See, e.g., District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-319 (1991); *Machipongo Land and Coal Co. v. Pennsylvania*, 799 A.2d 751, 768-79 (Pa. 2002). This approach emphasizes the state of mind of a reasonable plaintiff rather than the government conduct itself and has the benefit of treating similarly situated plaintiffs the same.

3. *Government Conduct School.* Other courts have held, finally, that it is the government regulation itself that determines the relevant parcel. *See Florida Rock Indus., Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *vacated on other grounds*, 18 F.3d 1560 (Fed Cir. 1994); *Twain Harte Assocs., Ltd. v. Tuolumne Cty.*, 265 Cal. Rptr. 737, 739-40 (Cal. Ct. App. 1990); *Dep't of Agriculture and Consumer Servs. v. Mid-Florida Growers, Inc.*, 521 So. 2d 101, 104 (Fla. 1988). Under this approach, the court looks at how the regulatory action purports to define the relevant parcel; thus, courts have found that the "nature of a particular ... regulation" may have the effect of "creating separate parcels for 'taking' purposes." *Twain Harte Assocs.*, 265 Cal. Rptr. at 744-45. The focus here is chiefly on what the

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theory in *Penn Central* as "an extreme—and we think, unsupportable view of the relevant calculus ...." *Lucas*, 505 U.S. at 1016 n.7.

government has done, rather than how much property the plaintiff happens to own, or the manner in which state laws otherwise regulated affected parcels.

Whatever the correct approach should be, the current disagreement among the lower courts should not continue. Indeed, this disagreement persists not only *among* courts throughout the country, but also *within* the Federal Circuit, the one court charged with exclusive jurisdiction over appeals from takings claims brought against the United States. *See* 28 U.S.C. § 1295(a)(3) (Federal Circuit has exclusive jurisdiction over final decisions of the United States Court of Federal Claims).

To be sure, takings questions are "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124. But the pressing issue here is the lingering and continued disagreement over the *legal framework* through which those facts are properly analyzed. To paraphrase Justice Brandeis, when it comes to property rights, it is more important that the law be settled than that it be settled in one fashion or another. *See Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

C. This Case is a Strong Vehicle for Answering the Lingering Denominator Question

In the decision below, the Federal Circuit's choice of the legal theory underlying the denominator effectively disposed of the appeal. The trial court had ruled that Rose Acre suffered a compensable taking because the USDA's order prohibited Rose Acre from selling nearly 700 million healthy eggs in the table egg market. App. 61a-63a. In so doing, the trial court considered the relevant denominator to be *all the eggs within the affected houses* (essentially adopting the third approach). The Federal Circuit, however, disagreed with this conclusion and measured the denominator based on *all eggs produced on Rose Acre's three affected farms*. App. 21a-22a. In so doing, the Federal Circuit appears to have

chosen the first of the competing denominator theories—thereby deflating the perceived economic impact of the USDA restrictions. Had the court chosen the second or third denominator theory, the trial court's legal conclusion on economic impact, as well as its factual findings concerning the destruction of the value of Rose Acre's eggs, would have been affirmed.

The court was apparently led astray by lingering confusion in this Court's own caselaw. Indeed, the Federal Circuit's conclusion rested on an analogy to *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 476-77 (1987). There, a mining company challenged a state law prohibiting mining that caused subsidence damage—*i.e.*, mining that damaged the areas above the ground—and, as a result, prohibited the mining of about 2 percent of the coal on the company's property. The mining company argued that the appropriate denominator was the coal left in the ground, arguing that the government had essentially appropriated that coal or deprived the company of a distinct "support estate" in the land. *See id.* at 497-98.

This Court rejected this argument, however, on the ground that both the owner's reasonable expectations and the state regulation treated the entire land as the relevant parcel. The support portions of the land in question did "not constitute a separate segment of property for takings law purposes." *Id.* at 498. Because the state law regulated the property as a whole, the appropriate denominator was the boundary of the affected property as a whole.

The Federal Circuit concluded below that each hen house should be analogized to a support column on the mining company's property. But the analogy is clearly flawed. In *Keystone Bituminous*, the state law targeted the mining company's *land*, not the personal property inherent in the *coal*. And because the subsidence question depended on the ability of the ground to have sufficient support to hold up the surface land safely, the ability to mine on one portion of the

land was inextricably linked to the ability to mine on another. This Court in *Keystone Bituminous* thus correctly held (i) that the regulated property interest was the mining company's interest in the land, not the coal, and (ii) that there was no basis for severing the mining company's land in multiple parcels.

In contrast, here the USDA order regulated Rose Acre's personal property—the eggs themselves, identified by reference to the individual houses that held the eggs. C.A. App. 835 n.8, 970. Contrary to the concern for subsidence in *Keystone Bituminous*, the destruction of eggs in one house has no economic impact on those in surrounding houses. There is simply no connection between the eggs within one affected hen house and the eggs that may otherwise be produced elsewhere on the same property or on another property in a distant state. And while the hen houses exist in a physical space (here a farm), Rose Acre's eggs are not a "product" of its real property, like coal mined from the ground. To the contrary, the eggs are the product of the hens, like automobiles are the products of a factory. On each farm, Rose Acre owns thousands of hens, which live in separate houses, and produce millions of eggs. Each egg is a unit of personal property all its own, fully transferable without requiring the "severance" of any property interest, like a fee simple estate at state law. The contrast with *Keystone Bituminous* is obvious and dispositive on its face.

In sum, the Federal Circuit's decision to measure Rose Acre's loss based on all the eggs produced on each farm represented a choice to define the denominator based on the "unitary ownership" theory discussed above. The court simply joined together—for no valid reason—eggs and hen houses based on physical proximity and common ownership by Rose Acre. As this Court suggested in *Lucas*, this constituted "an extreme—and … unsupportable—view of the relevant calculus." 505 U.S. at 1016 n.7. Had the court employed either of the other denominator theories—either by looking at Rose Acre's reasonable expectations about its

eggs or by looking at how the USDA order governed the use of eggs based on the hen house—the court would have rightly limited its purview to the affected eggs themselves.

The result of the Federal Circuit's rule is that the Fifth Amendment means something different depending on whether a business is large or small. In this case, if Rose Acre owned only the restricted houses, it would have stated an actionable takings claim since the denominator in the takings fraction would have been more or less the same as the confiscated property. But because Rose Acre owned greater holdings, with more hen houses, the denominator is misleadingly large, which deflates the relevant economic impact and immunizes *the same government conduct* from constitutional redress. The test of constitutionality, however, should turn on the nature of the taking—not on the identity or the other resources of the affected plaintiff.

For these reasons, this Court should grant certiorari to resolve the question of the appropriate denominator theory and reverse the Federal Circuit decision.

II. THIS COURT SHOULD CLARIFY THE LEGAL BOUNDARY BETWEEN A REGULATORY AND CATEGORICAL TAKING

In addition to the fundamental denominator question, the court below—in three additional instances—substantially undermined the constitutional requirement of Just Compensation by conflating the legal standards for regulatory and categorical takings. *First*, the court eviscerated the "character" prong of *Penn Central* by requiring a regulatory takings plaintiffs to prove that a government actor *knew* that its regulations were scientifically unsupportable at the time they were promulgated. *Second*, the court extended *Nollan*'s "no nexus" requirement to a regulatory takings claim, contrary to the instructions of this Court that such a requirement be confined to categorical takings or government-imposed exactions of real property.

Third, the court treated the destruction of physical property (the thousands of healthy and marketable hens) as a regulatory taking rather than the categorical taking that would have required compensation under the Fifth Amendment.

Given the exclusive role played by the Federal Circuit in hearing federal takings claims, and the fact that these errors continually arise, all three issues warrant review in order to settle the Fifth Amendment standards under which lower courts resolve two distinct categories of claims.

A. This Court Should Clarify The Proper Analysis Under the Character Prong of *Penn Central*

The Federal Circuit reversed the finding that the USDA regulations failed the character inquiry of *Penn Central* on the ground that Rose Acre did not argue or show "that the regulatory means were inconsistent with knowledge the government possessed at the time [the USDA regulations] were adopted or applied." App. 29a. This remarkable holding effectively requires *proof* that the government knowingly acted contrary to scientific knowledge prevailing at the time challenged regulations were promulgated.

The court cited no authority in support of this *scienter*-like requirement. And petitioner is aware of none. This Court has repeatedly held that the character inquiry asks only whether the challenged regulations are reasonably designed to achieve a stated purpose and substantially advance the public interest. *See, e.g., City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 701, 704-705 (1999) (holding that a jury instruction on character element should be directed to whether government action bore a "reasonable relationship" to "[a] legitimate public purpose"); *Lucas*, 505 U.S. at 1016 (holding Fifth Amendment is violated when regulation "does not substantially advance legitimate state interests") (internal quotation omitted); *Keystone*, 480 U.S. at 485 (holding that regulation effects a taking if it "does not substantially

advance legitimate state interest") (internal quotation omitted).

Consistent with these standards, Rose Acre demonstrated that USDA had little or no knowledge about the geographic or numeric prevalence of SE at the time the challenged regulations were promulgated. App. 55a-58a. Neither did USDA know how SE was transmitted, how serious or pervasive the problem was, or how to effectively control its spread. App. 21a-22a, 42a n.6, 55a-58a. Nonetheless, USDA responded with regulations so broad that almost all of the eggs falling within its restrictive regulatory orbit were free of SE. App. 57a-58a & n.3. As the trial court found, the USDA regulations were effectively an *experiment* that relied on the speculative and untested hypothesis that SE in a hen environment would necessarily translate into SE in hen-laid eggs. App. 56a ("The regulations' requirements were based primarily on this belief."). That hypothesis was ultimately proven to be wrong and unfounded—but not until the USDA restricted the sale of over one billion healthy eggs nationally, *nearly 700 million* of which belonged to Rose Acre. *See* Br. of Appellee at 37-43.

The question presented here is *who* should pay when a government hypothesis is proven so wrong? Clearly the government should not be entitled to use private farmers as guinea pigs in an experiment that confiscates livestock, restricts the sale of marketable produce, and results in millions of dollars in losses, with no compensation whatsoever paid to the affected private parties. Such overreach—as the trial court found—is precisely what the character prong of *Penn Central* is designed to guard against.

Yet the court of appeals below essentially eviscerated that vital Fifth Amendment protection. Pursuant to its holding, takings plaintiffs must prove not only that the challenged regulations failed to substantially advance the public interest, but *also* that the government *knew* such regulations to be flawed at the time of enactment. This

severe weakening of the Fifth Amendment in such a vital venue as the Federal Circuit warrants review and reversal by this Court.

B. This Court Should Confirm That *Nollan*'s Nexus Requirement Applies only to Exaction of Land Cases

The trial court rightly found that the government conduct effectuated a taking because "the regulations at issue went too far in protecting [the public] interest by prohibiting the sale of [Rose Acre's] healthy eggs as table eggs." App. 66a. But according to the Federal Circuit: "[T]he issue is not whether a less restrictive alternative to the government action existed or was 'possible.' It is whether there is a *nexus* between the regulation and its underlying public purpose." App. 28a (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987)). *See also Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994). Thus, the severe restriction imposed upon hundreds of millions of healthy eggs—restrictions shown to lack any sound scientific foundation—survived scrutiny under the character prong of *Penn Central*. App. 29a.

The "no nexus" analysis should not have applied in the context of a regulatory taking. Indeed, this Court has consistently sought to limit that analysis to government-imposed exactions of land, saying "[w]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedications of property to public use." *City of Monterey v. Del Monte Dunes at Monterey Ltd.*, 526 U.S. 687, 702 (1999). And rightly so, because applying such a test in the context of a regulatory taking virtually ensures that the government will prevail. As this case amply demonstrates, any regulatory scheme will have *some* "nexus" to the public interest the scheme seeks to advance. That should not be enough, however, to relieve the government from paying compensation where property is

taken on the justification of advancing some public good. The court's employment of the nexus analysis to this regulatory takings challenge, therefore, sets a disturbing precedent at odds with both this Court's jurisprudence and the heretofore prevailing interpretation in the Federal Circuit.[5]

The court further compounded its error by reading all meaning out of the nexus requirement itself. According to the court, merely showing a "nexus" between a regulatory scheme and the public purpose is sufficient to survive a Fifth Amendment challenge. But this Court has never said any such thing—under *Nollan* or any other Fifth Amendment case.

Indeed, though a finding of *no nexus* would be dispositive in the *plaintiff's* favor, the contrary determination (that a nexus *does* exist) merely triggers further inquiry into whether the regulatory means bear a reasonable relationship to the stated government objective. As this Court has stated: "If we find that a nexus exists, *we must then decide the required degree of connection between the exactions and the projected impact of the proposed development*." *Dolan*, 512 U.S. at 386 (emphasis added). The court here simply skipped this second part of the analysis. App. 28a-29a.

Consequently, after imposing a *scienter*-like requirement on regulatory takings plaintiffs (requiring a showing that the government *knew* its regulations were fundamentally flawed

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[5] The Federal Circuit has also recognized that the "no nexus" inquiry should not apply to the character element in a regulatory-takings case. *See, e.g.*, *Kunkes v. United States*, 78 F.3d 1549, 1554 (Fed. Cir. 1996) (explicitly contrasting *Penn Central*'s regulatory-takings analysis with *Dolan*'s "nexus" test and noting that the latter applies to exactions for proposed developments). Because of the Federal Circuit's unique role in takings cases against the federal government, this split in the Federal Circuit's own jurisprudence with respect to regulatory takings is another marker in favor of *certiorari*.

at the time of promulgation), the court then went on to say that so long as there is *some nexus* between the regulations and the government's own stated objective, the character analysis is over. This double-burden shifting should not stand. For even if it is correct (i) to impose a heightened requirement under the character prong of *Penn Central* and (ii) to extend *Nollan* to a regulatory taking, it is clearly wrong to eliminate the *government's* burden of demonstrating "the required degree of connection" between its regulations and the public interest. *Dolan*, 512 U.S. at 386. By relieving the government of its burden to demonstrate that the property taken (hundreds of millions of *healthy* table eggs) was roughly proportional to the purpose it sought to achieve (restricting the sale of *SE contaminated* eggs), the Federal Circuit has established a Fifth Amendment framework virtually impossible for any claimant to meet.

At the very least, such a severe weakening of the Fifth Amendment, in the one appellate venue that hears Fifth Amendment claims against the federal government, warrants this Court's review.

C. This Court Should Delineate the Boundary Between Categorical and Regulatory Takings

It is undisputed that the government confiscated and destroyed more than 6,000 healthy hens. The trial court found the government's slaughter of hens to constitute a categorical taking of Rose Acre's property which required just compensation under the Fifth Amendment. App. 69a-70a.

But the Federal Circuit chose to analyze this cut-and-dry Fifth Amendment question under a regulatory takings framework. App. 30a-35a. Thus, it concluded that the trial court erred in conducting a categorical takings analysis on the ground that Rose Acre had other hens unaffected by the USDA and its regulations. App. 34-35a. The court's parcel-as-a-whole approach to a physical seizure of personal

property is at odds with this Court's jurisprudence and with common sense. As this Court recently stated:

> When the government physically takes possession of an interest in property for some public purpose, *it has a categorical duty to compensate the former owner, regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof.*

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 322 (2002) (emphasis added) (internal citations omitted). *See also Brown v. Legal Found. of Washington*, 538 U.S. 216, 233-34 (2003) ("[W]hen the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants, or when its planes use private airspace to approach a government airport, it is required to pay for that share *no matter how small*") (emphasis added) (internal citations omitted); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992) (describing "regulations that compel the property owner to suffer a physical 'invasion' of his property" as effecting a compensable taking "no matter how minute the intrusion").

The Federal Circuit here glossed over the fundamental distinction between confiscation, occupation or invasion of property, on the one hand, and a mere *restriction on the use* of property, on the other. The court thus blurred the clear jurisprudential line—drawn consistently by this Court—that separates two distinct categories of government action under the Fifth Amendment. The seizure and permanent destruction of personal property, in short, is not a restriction on *the use* of such property and thus should not be reviewed through the prism of a regulatory taking and *Penn Central* balancing.

In addition to conflating distinct strands of this Court's jurisprudence, the Federal Circuit also established an

intolerable split within its own decisions. The court purported to rely on its recent decision in *Sieber v. United States*, 364 F.3d 1356 (Fed. Cir.), *cert. denied*, 125 S.Ct. 113 (2004)—but that case involved a restriction on the *use* of property and thus fell squarely within the *Penn Central* purview. *Sieber* in fact presented a classic regulatory takings challenge to a government decision to deny a permit and thus foreclose one proposed use of real property. 364 F.3d at 1360-62. Such a case simply has nothing whatsoever to do with the questions presented here, where the affected property (hens) has been exterminated.[6]

The panel also relied on this Court's decision in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). App. 33a-34a. But *Ruckelshaus* involved the application of *Penn Central* to government conduct that this Court found to have fallen *short* of destruction or acquisition of private property. 467 U.S. at 1004-05. The questions pertaining to the destroyed hens in the instant case clearly involves nothing "*short of*" an acquisition or destruction of property—it involves exactly those things.

There can be no serious doubt that the Federal Circuit erred when holding that the confiscation and destruction of more than 6,000 healthy hens must be assessed under the *Penn Central* paradigm. Accordingly, this case presents an

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[6] The Federal Circuit has recognized as much before, rejecting a parcel-as-a-whole analysis under *Penn Central* when the government has physically seized or acquired property: "If a property owner owns a 100 acre of tract, and the Government ... took just 5 acres and left the property owner with 95, there would be no question that the owner was entitled to compensation for the parcel taken (plus severance damages attributable to the remaining tract)." *Florida Rock Indus., Inc. v. United States* 18 F.3d 1560, 1569 (Fed. Cir. 1994). The apparent arbitrary application of these standards in the Federal Circuit—the only Circuit that reviews challenges to federal government takings in the United States Court of Claims—at the very least warrants this Court's intervention and review.

ideal vehicle for clarifying the legal standards that separate regulatory and categorical takings claims—a matter that falls well beyond error correction and warrants the review of this Court.

III. THIS CASE SHOULD BE HELD PENDING DECISION IN *LINGLE V. CHEVRON U.S.A. INC.*

Even if this Court declines to grant certiorari on either of the aforementioned questions, the petition should be held pending a decision in *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 314 (*cert. granted* Oct. 12, 2004) (No. 04-163). As explained above, the Federal Circuit's decision turned in part on the extent to which the challenged regulations advanced the public interest. Because the reasonableness of the challenged regulations is relevant to both the court decision below and the contrary decision reached by the trial court, a hold for *Lingle* appears warranted.

The questions presented in *Lingle* are (i) whether challenges to a law's reasonableness or efficacy in accomplishing the government's objectives properly lie under the Takings Clause, and (ii) if so, what degree of scrutiny is warranted. Both questions implicate the analysis of the Federal Circuit's decision. The Ninth Circuit in *Lingle* held that regulations challenged under the Takings Clause must "substantially advance" a legitimate government interest. The trial court in this case ruled in Rose Acre's favor in part because the challenged regulations were "misguided" and based upon "ineffective testing methods," thus failing to effectively advance the stated government's interest. App. 65a-66a. The Federal Circuit opinion, as explained above, disagreed on the ground that the Fifth Amendment requires only *some* relationship between the regulations imposed and the underlying purpose. App. 29a.

Because the propriety and degree of inquiry into the validity of a government regulation under the Fifth

Amendment is precisely the issue presented in *Lingle*, this petition should at the very least be held until *Lingle* is decided. The decision below should then be vacated and remanded to allow the Federal Circuit to consider *Lingle*'s impact in the first instance.

Nonetheless, given the posture of this case, and the confusion in the legal standards that govern Fifth Amendment takings claims, the Court should grant certiorari on the questions presented regardless of the ultimate holding in *Lingle*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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